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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JAMA CONSTRUCTION CORPORATION, INC.,

Petitioner,

v.

CITY OF LOS ANGELES, CITY COUNCIL OF THE CITY OF LOS ANGELES, BOARD OF BUILDING AND SAFETY COMMISSIONERS OF THE CITY OF LOS ANGELES, DEPARTMENT OF BUILDING AND SAFETY OF THE CITY OF LOS ANGELES,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner won a writ of mandate in state court against the City of Los Angeles and then brought this action seeking damages for the taking of private property without just compensation and for the violation of Petitioner's civil rights pursuant to 42 U.S.C. § 1983. The District Court dismissed the suit finding the claims to be barred by the *res judicata* effect of the state court action. The Ninth Circuit upheld the dismissal on different grounds, finding that the court lacked subject matter jurisdiction as a result of Petitioner's failure to seek takings compensation through state procedures as required by *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985).

The questions presented are:

1. Does *Williamson* require Petitioner to pursue damages for regulatory takings through state procedures when such procedures do not exist and the highest court of the state involved has specifically rejected the availability of such relief?

2. Can Petitioner's claims pursuant to 42 U.S.C. § 1983 be barred by the *res judicata* effect of a state court judgment in Petitioner's favor which involved neither civil rights claims nor any claims for damages?

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jama Construction Corporation, Inc.,[1] respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled matter on July 15, 1991 (rehearing denied October 15, 1991).

[1] Pursuant to Supreme Court Rule 29, Petitioner has no parent or subsidiary companies.

OPINIONS BELOW

Without allowing oral argument or any amendment to the pleadings, the United States District Court for the Central District of California granted respondents' motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court's Order of dismissal of February 23, 1990 is found at Appendix B.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which entered judgment on July 15, 1991. The opinion is reported at 938 F.2d 1045 (9th Cir. 1991). A complete copy of the opinion is found at Appendix A.

On October 15, 1991, the Court of Appeals denied a petition for rehearing and rejected the suggestion for a rehearing en banc. A copy of the order is found at Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 15, 1991. A timely petition for rehearing, with suggestion of appropriateness of rehearing en banc, was denied on October 15, 1991, and this petition for a writ of certiorari was filed within 90 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."[2]

Title 42, United States Code

> "**§ 1983. Civil action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

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[2] The fifth amendment's taking clause, also known as the just compensation clause, was made applicable to the states through the fourteenth amendment in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

On June 5, 1989, the Los Angeles Superior Court issued a Writ of Mandate against the City of Los Angeles as a result of the City's failure to properly apply the California Environmental Quality Act ("CEQA")[3] to Petitioner's building project. *See*, Appendix E. The parties limited the issue litigated in state court to whether the City could require an Environmental Impact Report to remove dirt from the building site. On September 13, 1989, Petitioner filed this action seeking damages under two theories: (1) that the City's actions amounted to a temporary regulatory taking of property without just compensation; and (2) that various actions of the City and others had resulted in violations of Petitioner's civil rights pursuant to 42 U.S.C. § 1983.[4] The City moved to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On February 26, 1990, without allowing oral argument or any amendment to the pleadings, the District Court dismissed Petitioner's entire suit, ruling that Petitioner's claims were barred by the *res judicata* effect of Petitioner's state court mandamus victory. *See*, Appendix B. On March 28, 1990, Petitioner

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[3] CAL. PUB. RES. CODE § 21000 *et seq.* (West 1989).

[4] The statutory basis of subject matter jurisdiction of the District Court in this action is based on 42 U.S.C. § 1983.

appealed to the Ninth Circuit of the United States Court of Appeals.

After the parties filed their appellate briefs, all focusing on the correctness of the District Court's *res judicata* finding, the Ninth Circuit notified the parties just ten (10) days prior to the oral argument that:

> "Counsel shall be prepared at oral argument to discuss whether subject matter jurisdiction is lacking because Jama Construction Corp. did not first seek compensation through California procedures for the alleged regulatory taking before bringing its federal suit. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)."

See, Appendix C. At the May 16, 1991 hearing before the Ninth Circuit, oral argument was consumed almost entirely by a discussion of the *Williamson* jurisdictional issue.

The Ninth Circuit, in its brief decision of July 15, 1991, determined that the District Court should have dismissed Petitioner's action for lack of subject matter jurisdiction as a result of Petitioner's failure to seek takings compensation "through the procedures the State has provided for doing so." *See*, Appendix A, at 7. As the Court stated, "we have no reason to decide whether the action would be barred by *res judicata* as well." *Id.* at 6. The Ninth Circuit failed to refer the parties to any source, either inside the record or out, as to what procedure the State of California has provided for seeking just compensation for a temporary regulatory taking. In addition, despite its previous statement to the contrary, the Ninth Circuit dismissed in a footnote Petitioner's separate

claims under 42 U.S.C. § 1983 as barred by *res judicata*. *Id.* at 6-7, n.1. On October 15, 1991, the Petitioner's petition for rehearing was denied by the Court of Appeals (*see*, Appendix D).

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The United States Supreme Court should grant this writ because the Ninth Circuit's opinion, which upholds the dismissal of Petitioner's constitutional taking claim, rests on a misunderstanding of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and is contrary to prior decisions of the Ninth Circuit and other courts. *Williamson* does not require a property owner to pursue damage remedies created by federal law in state court. This Court's ruling requires only the pursuit of "reasonable, certain and adequate" procedures for obtaining compensation as created by state law. *Williamson*, 473 U.S. at 194. In California, no such procedures are available to Petitioner or to any other litigant seeking compensation for a temporary regulatory taking of private property.[5]

[5] The Court must consider that the *Williamson* issue on which the Ninth Circuit relies in dismissing Petitioner's entire suit for lack of jurisdiction *was never briefed by any party*. This is the result of the fact that the District Court dismissed the case on other grounds and the briefs on appeal addressed the

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In addition, the Ninth Circuit's holding that *res judicata* bars Petitioner's claims under 42 U.S.C. § 1983 directly conflicts with at least two previous decisions of that Circuit. *See, Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990); and *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986). The Ninth Circuit has held that Petitioner's previous state court victory in a mandamus action is *res judicata* to Petitioner's § 1983 claims for violations of due process and equal protection without making the required finding that it is "beyond doubt" that no possible theory could be advanced to support Petitioner's separate § 1983 counts. *See, Conley v. Gibson*, 355 U.S. 41 (1957).

The writ should also be granted because of the important public policy ramifications underscoring the Ninth Circuit's opinion. The Ninth Circuit has seemingly created a new conclusive presumption that if a writ of mandate is necessary a land use matter, a state court petitioner will be barred forever from pursuing any and all federal claims rightfully possessed by the petitioner.

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correctness of the District Court's position. The *Williamson* jurisdiction issue was raised only at the time of oral argument before the Ninth Circuit. At the very least, rehearing should be ordered to allow the Ninth Circuit to decide the jurisdiction issue with the benefit of full briefing.

II.

IN DISMISSING FOR LACK OF SUBJECT MATTER JURISDICTION THE NINTH CIRCUIT MISCONSTRUED THE SUPREME COURT'S DIRECTION IN THE *WILLIAMSON* CASE

A. The *Williamson* Second Prong Test

Williamson, supra, established two tests of ripeness for a taking claim. *See,* Comment, *Reaping the Fruits of a Ripe Property Takings Challenge: Eliminating the Ripeness Problem in Facial Regulatory Takings Cases,* 30 Santa Clara L.Rev. 865 (1990). The first test requires the property owner to have "obtained a final decision regarding how it will be allowed to develop its property." *Williamson,* 473 U.S. at 190. In the current suit, the Ninth Circuit raises no issue that Petitioner has failed to meet this prong.

The second prong dictates that the property owner must have sought compensation "through the procedures the state has provided for doing so." *Id.* at 194. Therefore, application of the second prong of the ripeness test requires a determination of whether the property owner can obtain compensation under state law. *Id.; see also Id.* at 186 [noting that respondent had not "utilized the statutory procedures Tennessee provides for obtaining just compensation"]; and *Id.* at 195 ["if a state provides an adequate procedure for seeking just compensation," then the property owner must use "the procedures provided by the state."] Specifically, *Williamson* requires that a "reasonable, certain and adequate provision for obtaining compensation [through state procedures] exist at the time of the taking." *Id.* at 194. Holding the *Williamson* facts unripe for adjudication, this Court relied upon specific Tennessee statutes and case law that "allowed recovery

through inverse condemnation where the 'taking' is affected by restrictive zoning laws or development regulations." *Id.* at 196.

B. California Law Does Not Provide a "Reasonable, Certain and Adequate" Procedure for Obtaining Compensation for Regulatory Takings

In applying the second prong of *Williamson*, the Ninth Circuit consistently inquires whether applicable state law provides compensation for the particular type of taking involved.[6] However, the Ninth Circuit's opinion

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[6] *See Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) [District Court should consider "whether Washington law provides" a damage remedy]; *Furey v. City of Sacramento*, 780 F.2d 1448, 1450 n.1 (9th Cir. 1986) [plaintiff "has no remaining state procedure by which to secure compensation"]; *Cassettari v. Nevada County*, 824 F.2d 735, 738 (9th Cir. 1987) [taking claim was premature because plaintiff could obtain damages for precondemnation activities under Section 1245.260 of the California Code of Civil Procedure]; *Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988) [plaintiff could seek compensation under Article I, Section 20 of the Hawaii Constitution]; *Bateson v. Geisse*, 857 F.2d 1300, 1306 (9th Cir. 1988) [taking claim was not ripe because it fell "within the scope of Montana's inverse condemnation law"]; *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1402-03 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1317, 1108 L.Ed.2d 483 (1990) [plaintiffs could obtain compensation for physical taking under specific California cases]; *Southern Pacific Transportation Company v. City of Los Angeles*, 922 F.2d 498, 505 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991) [plaintiff could obtain damages for precondemnation activities under specific California cases].

in the current suit sharply departs from this established approach. The opinion fails to identify any California statute or decision that would permit Petitioner to obtain compensation and further neglects to refer to "the procedures the State has provided for doing so." *Id.* In fact, California has no identifiable procedure for seeking compensation for a regulatory taking.

The Ninth Circuit admits that prior to this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), California, had no such procedure. *See*, Appendix A at 8-9, n.2. In *First English*, this Court held that a landowner whose property has been taken has a right to compensation under federal law. This Court did not, and cannot, establish "a procedure for seeking compensation" under California law. To determine whether such procedure exists, the Court must look to the statutes and case law of the State of California.[7]

In *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 588 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), the California Supreme Court held that damages were not an available remedy for regulatory taking, under either the Fifth Amendment to the United States Constitutional or Article I, Section 19 of the California Constitution. *See*, 24 Cal.3d at 273.[8] To the extent that

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[7] The specific state law remedies identified by the Ninth Circuit in *Cassettari* [precondemnation activities], *Sinaloa* [physical invasion] and *Southern Pacific* [precondemnation activities], *see* fn.2 *supra*, are not available to Petitioner here.

[8] Article I, Section 19 of the California Constitution provides in pertinent part that "private property may be taken or

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Agins found no right to compensation under federal law, it was overruled by *First English*. *See, First English*, 482 U.S. at 317-18. But, the *Agins* principle that compensation for a regulatory taking could not be recovered under California law remains an authoritative pronouncement of the law of the State of California. This Supreme Court had no authority to change that principal of state law, and did not purport to do so in *First English*.[9]

This point is vital because, as explained above, *Williamson* does not require a property owner to assert federal claims in state court. That would amount to a requirement of exhaustion of remedies, which this Court's *Williamson* decision specifically disclaimed. *Williamson*, 473 U.S. at 192-93, 194, n.13. Moreover, such a requirement would ignore the rationale of *Williamson*, which

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damaged for public use only when just compensation . . . has first been paid to, or into court for, the owner." Unlike the similar provision of the Hawaii constitution in *Austin, supra*, which had never been construed by a Hawaii court, *see* 840 F.2d at 681, the California Constitution has been specifically held by California's highest court not to confer a right to damages for regulatory taking. *Agins*, 24 Cal.3d at 273.

[9] The Ninth Circuit stated in dictum that *First English* "disapproved an aspect of California law . . . " *Hoehne v. County of San Bernardino*, 870 F.2d 529, 534 (9th Cir. 1989); *Sinaloa*, 882 F.2d at 1402; *see, also, Lockary v. Kayfetz*, 917 F.2d 1150, 1153-54 (9th Cir. 1990). This is correct in the sense that this Court has held that *Agins* misinterpreted federal law. It cannot mean, however, that this Court decided an issue of California law, for the court is "bound to accept the interpretation of a state's law by the highest court of the state." *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482, 488 (1976).

dictates that a taking is not "complete" until the state has denied compensation through its own procedures. *Id.* at 195. A federal taking claim includes the same substantive elements, including denial of compensation, whether asserted in state or federal court. Thus, if a taking remains incomplete or unripe because no authority has denied compensation, a federal taking claim is no more actionable in state court than in federal court.

As the Ninth Court stated, prior to *First English* it would have been "futile" for Petitioner to pursue its takings claim in state court. *See,* Appendix A, at 8-9, n.2. So what has happened since 1987 to create the required "reasonable, certain and adequate" procedure that the Ninth Circuit in this case now requires? No new statutory provision exists in California which provides a method of seeking compensation for a temporary regulatory taking. In addition, no "reasonable, certain and adequate" procedure exists in any new California case law. In fact, the California decisions which have considered *First English* agree that *First English* itself did not create the *Williamson* second prong procedure on which the Ninth Circuit based its decision in this suit. *See, Rossco Holdings, Inc. v. State of California,* 212 Cal.App.3d 642, 656, 660, 260 Cal. Rptr. 736 (1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1809, 108 L.Ed.2d 940 (1990) ["*First English,* however, did not address the *procedural means* by which a claim for inverse condemnation is asserted." (Emphasis in original.) "[E]ven on remand *First English* does not address procedural requirements and, in any event, involves an ordinance, not an administrative ruling."]; and *California Coastal Commission v. Superior Court,* 210 Cal.App.3d 1488, 1496, 258 Cal.Rptr. 567, *rev. denied and op mod.* (1989) ["As

we read it, *First Lutheran* addressed a relatively narrow issue." "*First Lutheran* says nothing, however, about when such a suit [for inverse condemnation] must be filed . . . "]. There being no contrary authority even the Ninth Circuit has made clear that it will not require litigants to trailblaze theories through the state courts in search of procedures to fulfill the *Williamson* requirements. *See, Sierra Lake Reserve v. City of Rocklin,* 938 F.2d 951 (9th Cir. 1991).

C. The Ninth Circuit's Opinion Effectively Bars All Regulatory Takings Claims From The Federal Courts

As interpreted by the Ninth Circuit, *Williamson* forces all takings claims into state court, regardless of the substantive state law.[10] Petitioner respectfully submits that this is a clear misreading of *Williamson* and a departure from prior decisions of the Ninth Circuit.[11]

If the term "procedure" as found in *Williamson* is determined to include state court inverse condemnation actions based on federal law, then the combination of

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[10] Takings claims are actionable under 42 U.S.C. § 1983. *Lake Country Estates v. Tahoe Planning Agency,* 440 U.S. 391, 398-400 (1979). Moreover, state courts have concurrent jurisdiction over § 1983 claims. *Maine v. Thiboutot,* 448 U.S. 1, 2, n.1 (1980). In this sense, a property owner can always seek damages for regulatory taking in state court, regardless of the content of the state law. Still, as this Court held in *Williamson,* the critical inquiry is to the availability of a damage remedy under state law. *See,* n.6, *supra.*

[11] *See, e.g.* n.6. *supra.*

Williamson and the opinion in this case results in a complete bar to regulatory takings claims in the federal courts. Any regulatory takings claims filed first in the District Court would be unripe since compensation is at least theoretically available in a state court action. If such a takings claim is made first in the state court and judgment is rendered, any attempt to further litigate in the District Court would be barred by *res judicata*.[12] If this Court had meant to bar regulatory takings claims from the federal courts it would have clearly said so in either *Williamson*, *First English* or both.

A much more reasonable approach would interpret *Williamson* in light of the more recent ruling in *First English*. At the time *Williamson* was decided, many states, including California, did not recognize a damage remedy for regulatory takings. However, following this Court's decision in *First English*, compensation is at least theoretically available as a remedy for regulatory takings in every court in the land. Thus, the second prong of *Williamson*, as interpreted by the Ninth Circuit, makes no sense and would effectively bar all takings claims from the federal courts. In light of *First English*, the only reasonable interpretation of the second prong of the *Williamson* ripeness doctrine is that it requires only the

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[12] This paradox is explored in Comment, *Reaping the Fruit of a Ripe Property Takings Challenge: Eliminating the Ripeness Problem in Facial Regulatory Takings Cases*, 30 Santa Clara L.Rev. 865, 886-897 (1990). The article concludes that courts should further analyze potential administrative futility, the possibility that specific legislative provision will never be applied, and the possibility of supplementing the judicial record prior to holding regulatory takings unripe. Such an analysis would prevent courts from ruling regulatory takings cases effectively unripe and moot at the same time.

pursuit of specific procedural remedies created by state law.

In this case, after Petitioner proved in the state court that the government acted wrongly, the Ninth Circuit denied it any opportunity to seek recompense for its damages. Nonetheless under *First English*, California law should allow a process for compensation. Practically, however, no "reasonably, certain and adequate" procedure exists, and no one has identified or described such a procedure,[13] yet the Ninth Circuit has sent Petitioner down the yellow brick road in search of this illusive requirement.

III.

THE NINTH CIRCUIT MISCONSTRUED THE LAW IN APPLYING *RES JUDICATA* TO PETITIONER'S 42 U.S.C. § 1983 CLAIMS

A. The Ninth Circuit Has Unwittingly Created A New Conclusive Presumption Barring § 1983 Land Use Claims From the Federal Courts

After deciding the case on jurisdictional grounds and stating clearly that the panel has "no reason to decide whether the action would be barred by *res judicata*," the Ninth Circuit dismissed Petitioner's claims for damages under 42 U.S.C. § 1983 as barred by the *res judicata* effect

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[13] At oral argument, the Ninth Circuit carefully asked each of the three counsel who spoke the same question: "Does California have a procedure for obtaining compensation for a regulatory taking?" Of course, no one could muster any answer other than to cite *First English*.

of Petitioner's state court mandamus victory. *See,* Appendix A, at 6-7, n.1. While the Ninth Circuit held that "a complaint must be read broadly to determine if the allegations provide for relief from any possible theory" and that Petitioner "is correct that it need not exhaust its available state compensation remedies before bringing its [§ 1983] claim," the court then makes the giant leap that Petitioner based its § 1983 claim on the same asserted wrong as Petitioner's state court mandamus action and is therefore barred by *res judicata. Id.* By failing to conduct any factually based comparison of Petitioner's state court action to the federal court § 1983 claims, and by failing to allow Petitioner even a single opportunity to amend its federal complaint to clarify such claims, the Ninth Circuit has in effect created a new conclusive presumption that *res judicata* will apply to all federal Constitutional claims which might have been brought as part of a state court mandamus action.

While the Ninth Circuit dismissed Petitioner's § 1983 claims in a footnote, the District Court found that the application of *res judicata* in this instance was "no simple matter" and that "the law in this area is uncertain and sufficiently complex to raise the possibility of success for plaintiff." *See,* Appendix B, at 6, 10. Clearly the District Court begged for guidance on this complicated issue and the Ninth Circuit denied such a plea in a footnote.

B. The Ninth Circuit's *Res Judicata* Finding Conflicts With The Settled Law In This Area

The Ninth Circuit's cursory finding on *res judicata* conflicts directly with two important cases in this area. In

Norco Construction, Inc. v. King County, 801 F.2d 1143 (9th Cir. 1986) plaintiff originally initiated a state court mandamus action seeking the approval of a particular subdivision application. After success in the writ action, plaintiff brought a separate federal action for damages based on tort theories, inverse condemnation and 42 U.S.C. § 1983. The Court held that *res judicata* did not bar Norco's damage claims in light of the previous state court mandamus action. *Norco*, 801 F.2d at 1146-7. The *Norco* court found that all Norco could have shown in the mandamus proceeding was a right to have some particular action taken on its application, and that it remained unlikely that it could have shown any substantial damage caused by the violation of that right alone. *Id.* The Court further ruled that the scope of Norco's separate claim for damages based on 42 U.S.C. § 1983 extended beyond seeking compensation solely for the failure to take some action on its subdivision application. *Id.* at 1147. Instead, such action seeks recompense for the refusal of the County to permit Norco to subdivide its property and for other specific acts taken by the County and individual defendants. *Id.*

In the current suit, Petitioner followed the exact course set out in *Norco*. When the City acted wrongly by misapplying CEQA, Petitioner sought mandamus on that state law issue alone. Later, Petitioner properly brought this action seeking damages pursuant to § 1983 based on respondents' illegal conduct to frustrate an approved project, their abuse of public proceedings for the purpose of delay and damage to Petitioner, their discriminatory application of city and state laws, and their intentional interference with Petitioner's use of private property.

Similarly, in *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), the court allowed the plaintiff association to pursue § 1983 claims in federal court despite the requirement that it pursue a state court action on its takings claims. The Ninth Circuit's opinion in the present suit conflicts directly with *Sinaloa* in that *Sinaloa* speaks in detail about how a plaintiff's § 1983 claim should be given every opportunity to survive a Rule 12(b)(6) motion to dismiss. As stated in *Sinaloa*, motions to dismiss for failure to state a claim must be viewed with "particular skepticism" in cases involving claims of inverse condemnation and due process violations involving land use matters. *Sinaloa*, 882 F.2d at 1401, *citing Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). In *Sinaloa*, the Court found that the claim for violation of substantive due process "goes beyond the taking of plaintiffs' property; plaintiffs claim that government officials abused the legitimate police powers entrusted to them." *Sinaloa*, 882 F.2d at 1410. In view of the egregious overstepping by local authorities in *Sinaloa*, the court responded by rejecting defendants' arguments for a sanitary disposition of the case based on the pleadings by stating that "[w]hile defendants dispute these charges, that dispute cannot be resolved on a motion for judgment on the pleadings." *Id.*

The facts here clearly warrant this Court granting the same rights to Petitioner. Clearly, the court should not dispose of Petitioner's legitimate claims at the pleading stage. At the very least, Petitioner is entitled to an opportunity to amend the complaint to clarify the constitutional violations alleged. As this Court has held, in

federal court a complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts to support its claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) [footnote omitted]. The Ninth Circuit's summary dismissal of Petitioner's § 1983 claims directly conflicts with these overriding principles.

IV.

THE GRANTING OF THE WRIT IS APPROPRIATE GIVEN THE PUBLIC POLICY ISSUES AT STAKE, THE CONFLICTS CREATED WITH OTHER CASES, AND THE CONFUSION WHICH EXISTS ON THESE IMPORTANT ISSUES

A. The Ninth Circuit Must Not Deny Access To All § 1983 Claims In Takings Cases

As a result of the Ninth Circuit's opinion, the law now requires a plaintiff to relinquish access to the federal courts in every instance where state court mandamus is necessary to correct an inappropriate government action. When a local government acts improperly and creates a temporary regulatory taking of property, a plaintiff must act quickly both to preserve its rights and to mitigate its damages.[14] The California courts have held that a

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[14] In California, if the government has taken an improper administrative action plaintiff has only 90 days to seek mandamus. *See* CAL. CIV. PROC. CODE § 1094.6. In such an action, which is heard by the California courts on an expedited basis, separate and apart from any other claims which a plaintiff might have, only the issue of the government's inappropriate action is before the court.

property owner must first bring an administrative mandamus action as a "necessary procedural predicate" to seeking inverse condemnation damages. *See, Rossco Holdings*, 212 Cal.App.3d at 657. The court in *Rossco Holdings* concluded that a party may bring a mandamus action "before, or in conjunction with" a claim for inverse condemnation or other damage claims. *Id.* at 662. Given that the mandamus action must be brought first in state court, and the Ninth Circuit's opinion here that related § 1983 claims will be summarily dismissed as *res judicata* upon a finding that there was state adjudication of a mandamus claim involving the same property, then to protect the right to pursue § 1983 claims in the land use context all future plaintiffs must forego the possibility of federal court adjudication of their § 1983 claims.

While this Court has found that litigation of § 1983 claims in the state court is not inherently prejudicial to plaintiffs, forcing an entire category of § 1983 claims out of federal court is clearly contrary to Congressional intent.[15] This federal statute deters abuses of process by state and local governments by keeping access open to federal courts for due process violations. Under § 1983 "an aggrieved citizen is provided a neutral federal forum in which to air his complaint, *instead of being forced to sue his state officials in state courts.*"[16]

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[15] U.S. Congress, House Report No. 96-548, October 24, 1979, Background as to H.R. 3343.

[16] *See* n.15, *supra* (emphasis added).

B. The Writ Is Necessary To Provide Consistency In The Law

The granting of the writ is also appropriate as a result of the direct conflicts of the Ninth Circuit's opinion with other decisions. The Petitioner has already identified a number of cases which conflict with the Ninth Circuit's interpretation of the *Williamson* second prong requirements in the current suit. *See,* n.6, *supra; see also, Sierra Lake,* 938 F.2d 951. In addition, Petitioner has discussed direct conflicts between the application of *res judicata* in the opinion and the Ninth Circuit's own previous decisions in *Norco* and *Sinaloa, supra.* Decisions in other Circuits regularly allow § 1983 litigation to proceed in the federal courts regardless of existence of related state court mandamus or takings claims. *See, e.g., Littlefield v. City of Afton,* 785 F.2d 596, 603-8 (8th Cir. 1986); *Scott v. Greenville County,* 716 F.2d 1409, 1419 (4th Cir. 1983); and *de Botton v. Marple Township,* 689 F. Supp. 477, 481 (E.D. Pa. 1988).

The Ninth Circuit's recent decision in *Zamsky v. Hansell,* 933 F.2d 677 (9th Cir. 1991), while not directly on point, decided the issue of the defendants appropriate level of immunity in a § 1983 action brought against local land use planners. Because the court must treat ripeness as a jurisdictional question, it is clear that the appellate court found jurisdiction in *Zamsky* to allow a decision on the merits of the case. If the Ninth Circuit in fact lacked jurisdiction here because the Petitioner did not first seek compensation in the state court, then there would have been no need to reach the immunity issues which resulted in the *Zamsky* decision. Therefore, the Ninth Circuit's jurisdictional finding in the current suit directly conflicts with *Zamsky.*

C. The Granting of the Writ Will Serve Judicial Economy By Resolving The Confusion Which Reigns In This Area Of The Law

Perhaps most importantly, the granting of the writ and a definitive decision is necessary, and in the best interest of judicial economy and the economy of resources of potential litigants, in order to resolve the confusion that reigns with regard to the appropriate method of litigation of these types of actions. As the District Court stated in this case, the proper place and order of the litigation of issues arising from improper government land use actions "is not a simple matter." *See*, Appendix B, at 6. While the Ninth Court's decision is based upon the assumption that a "reasonable, certain and adequate" provision for compensation for temporary regulatory takings exists in California, no one can describe such procedure and no one has pursued it. The Ninth Circuit bases its assumption that such procedure exists on *First English* while the California courts interpret *First English* not to have established any particular procedural process nor even to apply specifically to any particular case. Even the plaintiff in *First English* was unsuccessful on remand in identifying California's procedure for compensation of regulatory takings. *See, First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal.App.3d 1353, 258 Cal.Rptr. 893, *rev. denied* (1989), *cert. denied*, 493 U.S. 1056 (1990).

V.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court grant this petition for a writ of certiorari.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMA CONSTRUCTION, *Plaintiff-Appellant,* v. CITY OF LOS ANGELES; BOARD OF BUILDING AND SAFETY COMMISSIONERS OF THE CITY OF LOS ANGELES; DEPARTMENT OF BUILDING AND SAFETY OF THE CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES, *Defendants-Appellees.*	No. 90-55475 D.C. No. CV-89-5432-WDK OPINION

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted
May 16, 1991 – Pasadena, California

Filed July 15, 1991

Before: Harry Pregerson, Melvin Brunetti and
Thomas G. Nelson, Circuit Judges.

Per Curiam

SUMMARY

Jurisdiction

Affirming a district court judgment, the court of appeals held that it lacked subject matter jurisdiction over an appeal alleging an unconstitutional "taking" of property where the property owner had not utilized procedures for obtaining compensation.

Appellant Jama Construction Corporation, Inc. bought property for development after a city planning commission had prepared environmental assessment and negative declaration reports and adoption of zoning changes. Subsequently, the Board of Building and Safety Commissioners ordered that an Environmental Impact Report (EIR) be prepared for the project. Jama then filed suit in state court, requesting a writ of mandate ordering the issuance of all clearances and permits necessary to begin construction without completion of the EIR. The Board's response that an EIR was not required was reversed by the city council. After a hearing, the state court held that an EIR was not required. Jama then filed suit in federal district court seeking damages under section 1983 and the fifth amendment for a temporary regulatory taking of property without just compensation. The district court granted appellees' motion to dismiss on the ground that, under the doctrine of res judicata, Jama's action was barred by the prior state court action.

[1] Although the district court granted appellees' motion to dismiss "because plaintiff's claim is barred by res judicata," the appeal court could affirm on any

ground supported by the record. Because the court determined that the district court should have dismissed Jama's motion for lack of subject matter jurisdiction, it had no reason to decide whether the action would be barred by res judicata as well. **[2]** The Supreme Court has held that a taking of a property interest is not ripe for judicial review until the government entity charged with implementing the regulations has reached a final decision requiring the application of the regulations to the property at issue. The Supreme Court has also explained that, because the fifth amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a section 1983 action. **[3]** The court found this second requirement to be dispositive here. Because Jama did not seek compensation through state procedures before bringing its federal action, Jama's action was not ripe for decision, and the court dismissed for lack of subject matter jurisdiction.

COUNSEL

Fred N. Gaines and Benjamin Reznik, Reznik & Reznik, Sherman Oaks, California, for the plaintiff-appellant.

Susan D. Pfann, Assistant City Attorney, Los Angeles, California, for the defendants-appellees.

OPINION

PER CURIAM:

The sole issue in this appeal is whether plaintiff Jama Construction Corporation, Inc.'s (Jama) action in federal district court under 42 U.S.C. § 1983 is barred by a previous state court judgment. The district court held that plaintiff's § 1983 action is barred by its earlier suit in state court under the doctrine of res judicata. We affirm, but on a ground other than that relied on by the district court.

BACKGROUND

This appeal involves property located at 171 Church Lane, Los Angeles, California (property). In 1983 and 1984, the City Council for the City of Los Angeles (Council) initiated a number of suggested zone changes that would allow multi-unit development on the property. In 1983, and a second time in 1984, the City Planning Commission prepared environmental assessment and negative declaration reports for the recommended zone changes. After much debate, the Council passed an ordinance implementing a zone change with a 66-unit limit.

Plaintiff Jama bought the property after the zone change ordinance became final. To obtain approval to develop the property as an apartment building, Jama needed to obtain a permit to remove dirt from the site. After a public hearing where considerable public opposition to the project was expressed, the Board of Building

and Safety Commissioners (Board) ordered that an Environmental Impact Report (EIR) be prepared for the project.

On December 29, 1988, Jama filed suit in Superior Court, requesting a writ of mandate ordering the issuance of all clearances and permits necessary to begin construction *without completion of the EIR*. Jama argued that the Board had exceeded its authority in requiring the EIR because there had been no changes to the project since the prior environmental review.

Apparently in response to the litigation, the Board decided to reconsider its decision requiring an EIR for the project. After a public hearing on March 7, 1989, the Board reversed its earlier decision, concluding that an EIR was not required. Dissatisfied homeowners and an adjacent business appealed to the Council. On April 26, 1989, the Council reversed the Board, ordering that all permits be held in abeyance until completion of an EIR.

On June 5, 1989, the Superior Court held a hearing on Jama's request for the writ. It held that "the City had exceeded its authority when it required an EIR because there was nothing in the record to show that the circumstances required by the California Environmental Quality Act to trigger environmental review had occurred." *Jama Construction Corp. v. City of Los Angeles*, No. 89-5432, slip op. at 3 (C.D. Cal. Feb. 26, 1990) (*Order*).

On September 13, 1989, Jama filed a complaint in the district court seeking damages under 42 U.S.C. § 1983 and the Fifth Amendment for a temporary regulatory taking of property without just compensation. On February 23, 1990, the district court granted defendants' motion to

dismiss on the ground that, under the doctrine of res judicata, Jama's action was barred by the prior state court action.

DISCUSSION

We review de novo a district court's order granting a motion to dismiss for failure to state a claim under Fed. R. Civ.P. 12(b)(6). *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

[1] The district court granted defendants' motion to dismiss "because plaintiff's claim is barred by res judicata." *Order* at 8-9. We may affirm, however, on any ground supported by the record. *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 874 (9th Cir. 1987). Because we determine that the district court should have dismissed Jama's action for lack of subject matter jurisdiction, we have no reason to decide whether the action would be barred by res judicata as well.[1]

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[1] In its complaint, Jama breaks down its action into two claims: (1) "undue interference with property rights" under § 1983 and (2) unlawful taking. The district court reasonably read the complaint as presenting a single claim for a temporary regulatory taking of property under § 1983 and the Fifth Amendment. As discussed in the text, we dismiss this takings claim as unripe.

In its reply brief and at oral argument, Jama characterizes its undue interference claim as a due process claim distinct from its takings claim. On a motion to dismiss, a complaint must be read broadly "to determine if the allegations provide

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[2] In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), the Supreme Court enunciated two requirements a plaintiff must meet before bringing a taking claim in federal court. First, the Court confirmed that "a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186, 105 S. Ct. at 3116. Second, a taking claim is premature unless the plaintiff has sought "compensation through the procedures the State has provided for doing so." *Id.* at 194, 105 S. Ct. at 3120. The Court explained that, "because the Fifth

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for relief on any possible theory." *Electrical Constr. & Maintenance Co. v. Maeda Pacific Corp.*, 764 F.2d 619, 623 (9th Cir. 1985). To the extent that Jama's complaint does allege a due process claim, Jama is correct that it need not exhaust its available state compensation remedies before bringing its claim. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (1990). But Jama's due process claim is barred by the California doctrine of res judicata because it failed to present the claim in its earlier California mandamus action. *See Sanchez v. City of Santa Ana*, No. 85-6504, slip op. 6577, 6593 (9th Cir. May 24, 1991) ("where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, res judicata will bar the federal constitutional claim, whether or not it was asserted specifically in state court"); *see also Gallagher v. Frye*, 631 F.2d 127, 130 (9th Cir. 1980) (§ 1983 claim may be raised in a California mandamus action). Section 1983 claims for violations of constitutional rights are not immune from the preclusive effect of res judicata. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 104 S. Ct. 892 (1984) (state preclusion law applies to § 1983 claims).

Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Id.* at 194 n.13, 105 S. Ct. at 3120 n.13 (emphasis in original); *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350, 106 S. Ct. 2561, 2566 (1986) ("a court cannot determine whether a municipality has failed to provide 'just compensation' until it knows what, if any, compensation the responsible administrative body intends to provide").

[3] We find this second requirement to be dispositive here. Jama did not seek compensation through California procedures before bringing its federal action. Because Jama's action is not ripe for decision, we dismiss for lack of subject matter jurisdiction. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989) ("lack of ripeness deprives the court of subject matter jurisdiction"), *cert. denied*, 110 S. Ct. 1317 (1990).[2]

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[2] If the alleged "taking" of Jama's property occurred before the Supreme Court decided *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S. Ct. 2378 (1987), Jama's failure to seek compensation through state procedures might be forgiven as "futile." *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) ("[p]laintiffs need not bring a state court action [seeking compensation] when it would be futile under existing state law"); *cert. denied*, 110 S. Ct. 1317 (1990). Before *First English*, California law precluded a landowner from recovering damages in an inverse condemnation action for a temporary regulatory taking. *See Agins v. City of Tiburon*, 24 Cal.3d 266, 274-77,

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AFFIRMED.

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598 P.2d 25, 29-31, 157 Cal. Rptr. 372, 375-78 (1979), *aff'd on other grounds*, 447 U.S. 255, 100 S. Ct. 2138 (1980). Thus, in *Furey v. City of Sacramento*, 780 F.2d 1448 (9th Cir. 1986), we understandably held that plaintiff's failure to bring a non-existent inverse condemnation action in the California courts did not preclude him from bringing suit in federal court. *Id.* at 1450 n.1. But on June 9, 1987, the Supreme Court in *First English* rule that *Agins* erred in deciding that the Fifth Amendment does not require compensation for a temporary regulatory taking of property. Given that the "taking" alleged by Jama did not begin until 1988 at the earliest, Jama was not excused from first seeking compensation from the state before bringing its federal action.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMA CONSTRUCTION CORP., INC., a California corporation Plaintiff, v. CITY OF LOS ANGELES, CITY COUNCIL OF THE CITY OF LOS ANGELES, BOARD OF BUILDING AND SAFETY COMMISSIONERS OF THE CITY OF LOS ANGELES, and DEPARTMENT OF BUILDING AND SAFETY OF THE CITY OF LOS ANGELES, Defendants.	Case No. CV 89-5432-WDK (GHKx) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND DENYING DEFENDANTS' MOTION FOR ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988 (Filed Feb. 23, 1990)

Before the Court is defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and defendants' motion for attorney's fees pursuant to 42 U.S.C. § 1988. Having reviewed and considered the submissions of the parties, the Court hereby GRANTS defendants' motion to dismiss and DENIES defendants' motion for attorney's fees.

I. Background

Plaintiff, JAMA Construction Corp., Inc, is a California corporation engaged in the buying, development, and

sale of real property. The present controversy concerns property located on Church Lane in Los Angeles ("Property").

In 1983 and 1984, the City Council and the City Planning Commission initiated a series of recommendations for zoning changes which would have allowed multiple-unit development on the Property. This zoning change was eventually adopted in February, 1987. An environmental assessment and negative declaration had been prepared in support of the City Council's actions during 1983 and 1984. These documents in support of the 1984 actions were adopted by the Council in support of the 1987 zoning change.

Plaintiff initially attempted to develop the property as a condominium complex. To do so it had to apply for a tract map. The City Planning Department decided that plaintiff would have to complete an Environmental Impact Report ("EIR") in support of such an action. Plaintiff decided to withdraw this application and simply develop the lot as an apartment building.

In order to receive a building permit, plaintiff had to obtain a permit to remove dirt from the site. On September 13, 1988, following the required public hearing on this permit at which considerable opposition was voiced over the whole project, the Board of Building and Safety Commissioners ("Board") ordered that an EIR be prepared with respect to the project.

The Board held a subsequent hearing limited strictly to the issue of the haul route on March 7, 1989, at which

the haul route and the project were approved. This decision was appealed to the City Council by adjacent homeowners and businesses. On April 26, 1989, the City Council revoked the Board's approval, instructed the Department of Building and Safety to prepare an EIR on the hauling operation, and ordered all permits held pending completion of the EIR.

On December 29, 1988, plaintiff filed suit in Superior Court seeking writ of mandate and declaratory relief against the City, City Council, and Board asking that the City be ordered to issue the necessary permits. A hearing was held on June 5, 1989, and the court ruled for plaintiff, stating that the City had exceeded its authority when it required an EIR because there was nothing in the record to show that the circumstances required by the California Environmental Quality Act to trigger environmental review had occurred.

Plaintiff subsequently brought this action seeking damages under 42 U.S.C. § 1983 and the Fifth Amendment of the Constitution for a temporary unlawful taking of property without just compensation. Defendants move to dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) stating that plaintiff's action is barred by the prior state court action.

II. Discussion

A. Defendants' Motion to Dismiss

On a motion to dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(6), the court must accept all factual allegations of the complaint to be true and draw

all reasonable inferences in favor of the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896 (9th Cir. 1986); *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980).

The sole ground for dismissal raised by defendant is that the present action is barred by res judicata because of a state court judgment on a prior action.[1] "It is well established that the determination of this question [res judicata] is one of law for the trial court in the exercise of its jurisdiction. *Baird v. Superior Court*, 204 Cal. 408." *Solari v. Atlas-Universal Service, Inc.*, 215 Cal. App. 2d 587, 601 (1963).

A state court judgment is given the same preclusive effect in federal court as it would be given in state court. *Heath v. Cleary*, 708 F.2d 1376, 1379 (9th Cir. 1983). "[W]hen a party seeks relief in the state court for an alleged wrong, the state court judgment bars the plaintiff from seeking relief on constitutional grounds from the same defendant for the same wrong, in federal court." *Gallagher v. Frye*, 631 F.2d 127, 128 (9th Cir. 1980) (citing *Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*,

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[1] The appropriate method for raising the defense of res judicata is pursuant to Fed. R. Civ. P. Rule 8(c). *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4405 (1981). However, the matter can also be raised by motion to dismiss pursuant to Rule 12(b)(6) where the complaint clearly indicates the existence of the affirmative defense. *See, e.g. Concordia v. Bandekovic*, 693 F.2d 1073 (11th Cir. 1982); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 at 609 (1969). In considering such motions, the court may take judicial notice of prior judgments and pleadings. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1364 at 672 (1969).

423 U.S. 1066 (1976)). This rule is applicable to actions brought pursuant to 42 U.S.C. § 1983. *Id.*[2]

Under California law, the doctrine of res judicata prohibits further litigation by the parties on the same "cause of action" after a judgment is obtained. *See Slater v. Blackwood*, 15 Cal. 3d 791, 795 (1976); *Hatch v. Bank of America*, 182 Cal. App. 2d 206 (1960); 7 B. Witkin, *California Procedure, Judgments* § 243 (1985). To determine whether the same cause of action is at issue, the California courts employ the "primary rights" theory. As stated in *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170 (1983), "if two actions involve the same injury to the plaintiff and the same wrong by the defendant the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Id.* at 1174-75. Therefore, the invasion of one

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[2] The issue is not one of competency of the California court to hear a 42 U.S.C. § 1983 action or the jurisdiction of that court to award damages. It is clear that a claim involving federal constitutional rights may be joined to a California mandamus action. *Gallagher*, 631 F.2d at 127 (42 U.S.C. § 1983 claim may be joined to a California mandamus action). In addition, state courts are competent to hear claims of 42 U.S.C. § 1983 violations. *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). Last, a California court may grant relief in the form of damages together with a writ of mandamus regarding the same action. *See* Cal. Civ. Pro. Code §§ 1090, 1095 (1990). Therefore, the claim could have been brought by the plaintiff at the same time as the writ of mandamus action. Whether this motion should be granted depends solely on California res judicata law.

primary right gives rise to one cause of action. *Slater,* 15 Cal. 3d at 795.

While the determination of whether one or more "primary rights" exists is not a simple matter, a number of cases involve either property rights and zoning regulation or state court actions and subsequent 42 U.S.C. § 1983 claims. In *California Coastal Com. v. Superior Court,* 210 Cal. App. 3d 790, *modified,* 210 Cal. App. 3d 1488 (1989), plaintiff brought suit for inverse condemnation where the state required an easement across his land. Plaintiff had not appealed this administrative decision during the statutorily defined review period by seeking a writ of mandamus. The state argued, and the court agreed, that this failure constituted a judgment against the plaintiff, and that it barred the subsequent suit against the state. In so holding, the court must assume that one primary right would have been at issue in the writ of mandate action and the inverse condemnation action.

In *Clark v. Yosemite Community College Dist.,* 785 F.2d 781 (9th Cir. 1986), plaintiff was a teacher in a community college who was accused of sexual harassment and discrimination by students. His employer maintained a file on him and allegedly interfered with his teaching and with outside business contacts. Plaintiff sought, and obtained, a writ of mandate ordering the employer to desist from interfering with plaintiff's teaching and to remove derogatory materials from his file. Plaintiff then brought an action in federal court based on 42 U.S.C. 1983 seeking damages for defamation. The court of appeals upheld the district court decision that this was one "primary right" and that the action was barred by the prior

state court proceeding. *But see Gallagher*, 631 F.2d at 127 (in employment termination case, writ of mandate ordering back pay and reinstatement did not bar § 1983 suit for wrongful conduct).

Likewise, *Takahashi v. Board of Trustees of Livingston*, 783 F.2d 848 (9th Cir. 1986), *cert. denied*, 476 U.S. 1182 (1986), involved a teacher's employment dispute. Plaintiff was fired and sought a writ of mandate seeking reinstatement. Plaintiff failed and subsequently brought an action in federal court under 42 U.S.C. § 1983 alleging discrimination. Again, the court of appeals upheld the district court's holding that this was one primary right and that the state action barred the federal action.

In the present case, plaintiff has brought an action claiming damages resulting from the unauthorized demand of the city that an EIR be completed on plaintiff's project. In the prior state court action, plaintiff sought a writ of mandate forcing the city to retract its unauthorized demand that an EIR be completed. Given the above case law, defendants' motion seems well-based.

Plaintiff has suffered injury to one primary right. The City acted in an apparently unauthorized fashion and placed an additional roadblock in plaintiff's path. Under present law, plaintiff may recover damages for such actions as well as force the removal of those roadblocks. However, in California, where a plaintiff complains of a taking of land due to governmental action, one primary right is injured. *See Rossco Holdings Inc. v. State of California*, 212 Cal. App. 3d 642 (1989) (holding that failure to seek administrative mandamus precludes suit for inverse condemnation). Therefore, since plaintiff sought only to

eliminate the barrier to the construction of its project in its first action, it cannot now seek the additional remedy of damages.[3]

Plaintiff offers two arguments in response. First, plaintiff argues that the issues of damages and 42 U.S.C. § 1983 were never pleaded or argued. The fact that plaintiff did not plead or argue any damage issue in the prior action is immaterial to the determination of the res judicata issue. As stated in *Slater*, 15 Cal. 3d at 791, "a judgment . . . is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief." *Id.* at 795.

Second, plaintiff argues that the issue of damages was not ripe for adjudication until such time as the writ of mandate was issued against the defendants. However, plaintiff does not demonstrate that damages could not be computed upon a determination that the writ should issue. In *Rossco*, 212 Cal. App. 3d at 642, the court states in response to the argument that a mandamus requirement is out of step with recent Supreme Court cases:

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[3] The present case can be distinguished from a situation where more than one primary right is affected. For example, in *Norco Constr., Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986), applying Washington law, the Court of Appeals held that a state court writ of mandamus action did not bar a subsequent federal action seeking damages. In that case, the court pointed out that in the mandamus action the plaintiff sought to have a particular development plot approved, while in the damages action, the plaintiff sought damages for refusal to permit any kind of subdivision. Therefore, plaintiff claimed injury to more than one primary right.

"There has been no showing that a mandamus proceeding joined with an action for inverse condemnation is not effective." *Id.* at 659-60. Allowing plaintiff to go forward with the present action seems roughly analogous to allowing a plaintiff to sue once for general damages, and again for consequential damages.

Therefore, defendants' motion to dismiss for failure to state a claim is granted because plaintiff's claim is barred by res judicata.

B. Defendants' Motion for Attorney's Fees

Defendants' move for an award of attorney's fees pursuant to 42 U.S.C. § 1988. Under that statute, the district court may award attorney's fees to the prevailing party at its discretion for any action "properly brought under § 1983." *Maine v. Thiboutot*, 448 U.S. 1, 9 (1980).

To prevent the possibility of discouraging prospective plaintiffs, a prevailing defendant should be awarded fees only when the action is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)). *See also Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983).

In *Boatowners*, a district court's determination that attorney's fees should not be awarded to a prevailing defendant was upheld by the Court of Appeals where the claims concern complex constitutional issues. *Id.* at 664.

In the present case, defendants do not show that they are entitled to an award of attorney's fees. First, they do

not cite any authority in support of the proposition that plaintiff's action is frivolous. Second, the law in the area is uncertain and sufficiently complex to raise the possibility of success for plaintiff. Given this, plaintiff's claim is not frivolous, unreasonable, or completely lacking in foundation. Defendants' motion for attorney's fees pursuant to 42 U.S.C. § 1988 is therefore denied.

For the foregoing reasons, defendants' motion to dismiss for failure to state a claim is GRANTED and defendants' motion for attorney's fees pursuant to 42 U.S.C. § 1988 is DENIED.

IT IS SO ORDERED.

Dated: February 21, 1990

/s/ William Keller
William D. Keller, Judge
United States District Court

APENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMA CONSTRUCTION, Plaintiff-Appellant, vs. CITY OF LOS ANGELES; BOARD OF BUILDING AND SAFETY COMMISSIONERS OF THE CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES, Defendants-Appellees.	No. 90-55475 D.C. No. CV-89-5432-WDK ORDER (Filed May 6, 1991)

Before: PREGERSON, BRUNETTI, and T.G. NELSON, Circuit Judges.

Counsel shall be prepared at oral argument to discuss whether subject matter jurisdiction is lacking because Jama Construction Corp. did not first seek compensation through California procedures for the alleged regulatory taking before bringing its federal suit. *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMA CONSTRUCTION, Plaintiff-Appellant, vs. CITY OF LOS ANGELES; BOARD OF BUILDING AND SAFETY COMMISSIONERS OF THE CITY OF LOS ANGELES; DEPARTMENT OF BUILDING AND SAFETY OF THE CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES, Defendants-Appellees.	No. 90-55475 D.C. No. CV-89-5432-WDK ORDER (Filed Oct. 15, 1991)

Before: PREGERSON, BRUNETTI, and T.G. NELSON, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX E

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Attorneys for Petitioner,
JAMA CONSTRUCTION CORPORATION, INC.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JAMA CONSTRUCTION CORPORATION, a California corporation, Petitioner, and Plaintiff, vs. CITY OF LOS ANGELES, a municipal corporation; DEPARTMENT OF BUILDING AND SAFETY OF THE CITY OF LOS ANGELES; BOARD OF BUILDING AND SAFETY COMMISSIONERS OF THE CITY OF LOS ANGELES; and DOES 1 through 100, inclusive, Respondents and Defendants.	CASE NO. C 709 806 JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS AND ON COMPLAINT FOR DECLARATORY RELIEF (Filed June 5, 1989)

The above-entitled cause came on for trial on May 22, 1989, in Department 88 of this Court, the Honorable Miriam Vogel, Judge Presiding, without a jury. Benjamin M. Reznik, Esq., of Reznik & Reznik, appeared on behalf of Petitioner and Plaintiff, JAMA CONSTRUCTION CORPORATION. James Hahn, City Attorney by and through William F. Childs, Deputy City Attorney, appeared on behalf of Respondents and Defendants, CITY OF LOS ANGELES (hereinafter "CITY"), Department of Building and Safety of the City of Los Angeles (hereinafter "DEPARTMENT"), and Board of Building and Safety Commissioners of the City of Los Angeles (hereinafter "BOARD") (hereinafter collectively referred to as "RESPONDENTS").

The Administrative Record having been received into evidence without objection, the Declarations of Lior Novik dated December 27, 1988, Benjamin M. Reznik dated March 6, 1989 and May 1, 1989, William F. Childs, dated May 17, 1989 and Richard Holguin dated May 16, 1989 having been received into evidence without objection, and the matter having been briefed, argued and submitted for decision, and the Court's Statement of Decision having been signed and filed:

1. A peremptory writ of mandamus shall issue from this Court, remanding the proceedings to respondent and commanding respondent to set aside its decision dated April 26, 1989, in the administrative proceedings in the matter of the appeal from the issuance of the haul route, and to reconsider its action in the light of this court's Statement of Decision;

2. In reaching its decision the Court found:

A. The project is not subject to further environmental review;

B. Petitioner is entitled to building, grading and any other permits necessary for construction of the project without being subject to any further environmental review;

C. The Los Angeles City Council exceeded its authority pursuant to *Public Resources Code* § 21166 in ordering environmental review;

D. The BOARD exceeded its authority in ordering an Environmental Impact Report prior to issuance of haul route clearance.

3. The Court will retain continuing jurisdiction over this matter.

DATED: June 5, 1989

By: MIRIAM A. VOGEL
THE HONORABLE MIRIAM VOGEL
Judge of the Superior Court

APPROVED AS TO FORM AND CONTENT

By /s/ William F. Childs
William Childs
Deputy City Attorney